No. 14-915

In the

# Supreme Court of the United States

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REBECCA FRIEDRICHS, ET AL.,
*Petitioners,*

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF BRUCE RAUNER, GOVERNOR OF ILLINOIS; AND KANELAND, ILLINOIS, UNIFIED SCHOOL DISTRICT # 302 ADMINISTRATIVE SUPPORT STAFF *AS AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICI CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 7

ARGUMENT ..... 9

I. *Abood* Is Built On Unworkable And Incorrect Assumptions ..... 10

A. Collective Bargaining In Illinois Is Indistinguishable From Lobbying On Matters Of Public Importance. ..... 10

B. The Free-Riding Rationale For *Abood* Ignores That Public Unions' Collective Bargaining Efforts Frequently Do Not Promote The Interests Of All Bargaining Unit Employees ..... 17

II. *Abood* On Its Face Conflicts With Core First Amendment Principles ..... 20

A. *Abood* Imposes Unconstitutional Conditions On Political Speech ..... 21

B. *Abood* Unconstitutionally Compels Unintended Speech ..... 23

C. *Abood* Unconstitutionally Imposes Viewpoint Discrimination ..... 25

CONCLUSION ..... 26

APPENDIX of Illinois News Coverage of Senate Bill 1229 ..... 1a

## TABLE OF AUTHORITIES

**Cases**

*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) ..... *passim*

*Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).15, 16

*Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668 (1996) ..... 21

*City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167 (1976) ..... 25

*Elrod v. Burns*, 427 U.S. 347 (1976) ..... 22

*Harris v. Quinn*, 573 U.S. ___ , 134 S. Ct. 2618 (2014) ..... 5, 9, 15, 20

*In re Pension Reform Litigation*, 32 N.E.3d 1 (Ill. 2015) ..... 7, 11

*Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) ..... 22

*Kimble v. Marvel*, 576 U.S. ___ , 135 S. Ct. 2401 (2015) ..... 9

*Knox v. Serv. Emps. Int'l Union*, 567 US __ , 132 S. Ct. 2277 (2012) ..... 23, 24

*Machinists v. Street*, 367 U. S. 740 (1961) ..... 7

*Obergefell v. Hodges*, 576 U.S. ___ , 135 S. Ct. 2584 (2015), ..... 9

*O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) ..... 21

*Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) ..... 16

*Perry v. Sinderman*, 408 U.S. 593 (1972).....20

*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)...20, 22

*Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).....9, 21

*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) .20, 24

*Railway Employees v. Hanson*, 351 U. S. 225 (1956).....7

*Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).....22

*Rosenberger v. Rector*, 515 U.S. 819 (1995) .....25

*Smiley v. Holm*, 285 U.S. 355, 365 (1932).....16

*Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) .20, 21

*United States v. United Foods*, 533 U.S. 405 (2001).....23, 24

*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).....22

*Wooley v. Maynard*, 430 U.S. 705 (1977) .....22

**Other authorities**

5 ILL. COMP. STAT. 315/6.....1

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AFSCME Master Contract 2012-2015, *available at* http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf.....2, 4, 12, 17, 18, 19

Andrew J. Biggs & Jason Richwine, *Overpaid or Underpaid? A State-by-State Ranking of Public-Employee Compensation American*

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Budget.Illinois.Gov, Office of Management and Budget, Executive Office of the Governor, http://www2.illinois.gov/gov/budget/Pages/BudgetBooks.aspx .....4

Complaint, *Bruce Rauner, Governor of the State of Illinois, v. American Federation of State, County, and Municipal Employees Council 31, AFL-CIO, et al.*, Case: 1:15-cv-01235, U.S.D.C., N.D.IL, Document #: 1 Filed: 02/09/15 .....2, 3, 4, 5

Daniel DiSalvo, *The Trouble with Public Sector Unions*, NATIONAL AFFAIRS, No. 5, p. 15 (Fall 2010). .....8

Executive Order 15-13, February 9, 2015 .....5

Illinois Education Association Website, http://www.ieanea.org/about/history/ .....6

Illinois Senate Bill 1229, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1229&GAID=13&DocTypeID=SB&SessionID=88&GA=99 .....14

Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 206 (1982) .....21

## INTEREST OF AMICI CURIAE [1]

### *1. Bruce Rauner, Governor of Illinois*

Amicus Bruce Rauner is the Governor of the State of Illinois. He is keenly interested in this matter because of the following facts, which he encountered upon being sworn in as Governor on January 12, 2015.

The Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315/6, governs collective bargaining between government employers and unions representing public employees in Illinois. Section 6 permits a collective bargaining agreement to require covered employees "who are not members of the organization" to pay "their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment," a so-called "fair share." *Id.* at 315/6(e).

The Illinois Department of Central Management Services ("CMS"), an agency within the direction and control of the Governor, has entered

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* or their counsel have made such a monetary contribution. Pursuant to Supreme Court Rule 37.3, the parties to this suit have submitted blanket consent to the filing of *amicus curiae* briefs in support of either or neither party, which blanket consent the Clerk of the Court has noted on the docket.

into collective bargaining agreements with multiple unions. *See, e.g.*, AFSCME Master Contract 2012-2015, *available at* http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf. The most recent agreements contain provisions requiring the State to automatically deduct "fair share" fees from nonmembers' paychecks and to be paid to the unions. *See id.* Art. IV Sec. 3. CMS, on behalf of the Governor, is currently engaged in contract negotiations in which the unions uniformly seek to require the State to continue this automatic deduction of "fair share" fees from nonmembers' paychecks.

By statute, nonmembers' "fair share" fees may not exceed the amount of dues required of members. See 5 ILL. COMP. STAT. 315/6(e). Yet unions do not account to nonmembers or the State for how they calculate or spend "fair share" fees. *See* Complaint, *Bruce Rauner, Governor of the State of Illinois, v. American Federation of State, County, and Municipal Employees Council 31, AFL-CIO, et al.*, Case: 1:15-cv-01235, U.S.D.C., N.D.IL, Document #: 1 Filed: 02/09/15, ¶ 55. Illinois state employee unions collect "fair share" fees ranging from 79% to 100% of members' dues. *Id.* ¶¶ 57–61. There is, in other words, no meaningful financial distinction between joining and not joining a public sector union in Illinois — in either case, the employee pays virtually the same amount per paycheck to the union.

Over 93% of the state government workforce in Illinois is unionized. According to recent data, of 46,000-odd Illinois State employees covered by collective bargaining agreements that report to the

Governor, 6,500 have chosen not to join a union. Yet those same objecting employees are forced to fund the unions' activities through "fair share" contributions. *Id.* ¶¶ 53, 62.

The American Federation of State, County, and Municipal Employees Council 31 ("AFSCME") is the largest state employee union in Illinois. In its required disclosures, AFSCME acknowledges that it uses its "fair share" fees for "lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement," "supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the fair share payor's employment," and "lobbying for purposes other than the negotiation, ratification, or implementation of a collective bargaining agreement," among other activities. AFSCME's activities funded by "fair share" fees are far broader than simply securing workplace protections and better employee compensation for its members.

Even those union activities that are confined to collective bargaining have significant political implications. Enriched by contributions from members and nonmembers alike, public sector unions in Illinois, whose labor and management sit on the same side of the table, have negotiated wages and benefits that have unrealistically kept going up while the state economy has kept going down. The connection is hardly coincidental.

Since 2004, public union employee wages have increased approximately 80%, compared to same-time inflation of 26% and private sector salary

increases of 31%. *Id.* ¶ 63. And a unionized Illinois government employee who earns an average $38,979 annual salary over a 26-year career contributes approximately only $40,539 to the State's pension system, yet is entitled to receive $821,588 in pensions, plus free retiree health care, over a twenty-year retirement. *Id.* ¶ 66. Together employee compensation constitutes more than 20% of all general fund expenditures. The balance of benefits not provided by return on this modest investment must be borne by the taxpayers.

These union benefits have contributed to a remarkable structural budget deficit and to repeated credit rating downgrades in Illinois. *Id.* ¶ 67. In fiscal year 2015, pension costs attributable to the general fund exceeded $7.5 billion, or about 24% of state-source general fund revenue. *Id.* The overall unfunded liability of the State's pension systems now exceeds $111 billion. *Id.* This in a state in which the annual projected general fund revenue is approximately $ 32 billion. *See* http://www2.illinois.gov/gov/budget/Pages/BudgetBooks.aspx.

Equally if not more important are the topics on which unions force the State to bargain. Unions have successfully bargained, for example, for "bumping" rights, which mean that, during layoffs inherent in facility closures, a more senior union employee can force a more junior colleague to "bump down" in rank or out of a job altogether. *See, e.g.*, AFSCME Master Contract, Art. XX Sec. 3. Similarly, more junior workers cannot be promoted over their more senior union colleagues in Illinois even if they have better evaluations or higher

performance, nor can they be rewarded financially for that performance.

Against that backdrop, on February 9, 2015, Governor Rauner issued Executive Order 15-13 directing CMS and other state agencies to cease enforcing fair share provisions in public sector unions' collective bargaining agreements. The Governor concluded that, in light of *Harris v. Quinn*, 573 U.S. ___, 134 S. Ct. 2618, 2631–32 (2014), he cannot facilitate the infringement of nonmembers' First Amendment rights to refrain from supporting public sector unions in their organization and collective bargaining activities. Rauner Complaint, ¶¶ 81–83. To do so would violate the Governor's own constitutional duties and oath of office.

Governor Rauner's Executive Order is properly limited by the Governor's authority, which extends only to employees of the Executive Branch under the jurisdiction of the Governor. To make sure that his constitutional determination applies broadly to all public sector employees in Illinois, including those educators and support staff who join him in this brief, the Governor has filed a federal court suit seeking a declaratory judgment that Illinois's statutory "fair share" provisions are unconstitutional under the First Amendment. *Id.* at 21. That lawsuit, now spearheaded by several state employees who object to fair share fees, as well as related litigation where several unions sued the Governor in state court are now stayed pending resolution of this case.

Governor Rauner wishes to bring to the Court's attention several salient examples from Illinois'

experience with public-sector collective bargaining that demonstrate why *Abood* should be overruled.

### *2. Kaneland, Illinois, Unified School District # 302 Administrative Support Staff*

*Amici* Support Staff are employed as administrative support staff in the District Office of Kaneland School District #302, in Maple Park, Illinois. Jennifer Stambaugh is a Principal Secretary with John Stewart Elementary School in Kaneland School District #302, in Maple Park, Illinois. Mary Albrecht, Lynn Cesario, Stephanie Douglas, Susan Hammermiester, Sheri Jenny, Laura McPhee, Lisa Pitstick, Joan Rule, Mary Scholl, Linda Spires, Hilary Swett, and Deborah Theis are members of the 10 and 12 month secretarial staff at Kaneland Community Unit School District 302. Dawn Decker, Deborah L Girard, Tina M. Pierson, Debra K. Rowe are additional administrative staff members. All object to having to join the union or to pay "agency fees" as a condition of their employment to the Illinois Education Association as a condition of their continued employment. The IEA is an affiliate of the National Education Association, the mission statement of which is explicitly in part "to be THE *advocacy* organization for all public education employees." http://www.ieanea.org/ about/history/. (Emphasis added). The "agency fees" are deducted directly from *amici*'s paychecks by their employers.

Because this case implicates the decision that permits such "agency shop" arrangements, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *amici* have a pronounced interest in the outcome of this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT[2]

This Court has historically upheld agency fees for private union workers on the ground that private sector political activity can be relatively easily separated from labor organizing and administration activities. *E.g., Machinists v. Street*, 367 U. S. 740 (1961); *Railway Employees v. Hanson*, 351 U. S. 225 (1956). But public sector unions differ fundamentally from private sector unions. In the public sector both management and labor are government employees and therefore sit on the same side of the bargaining table. Both management and labor therefore negotiate over how to spend the taxpayers' money, not their own. Every bargaining decision is thus an act of public policymaking, as it affects the political priorities of public spending.[3] In the guise of collective bargaining and member representation, therefore, public sector unions directly impact the amount of taxpayer funds available for necessary public services and profoundly affecting the financial solvency of state

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[2] All *amici* limit their comments to the first question presented in this case, namely whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

[3] *In re Pension Reform Litigation*, 32 N.E.3d 1, 6 (Ill. 2015) ("For as long as there have been public pension systems in Illinois, there has been tension between the government's responsibility for funding those systems, on the one hand, and the costs of supporting governmental programs and providing governmental services, on the other.")

and local governments. *See* Daniel DiSalvo, *The Trouble with Public Sector Unions*, NATIONAL AFFAIRS, No. 5, p. 15 (Fall 2010).

*Abood's* attempted distinction between unions' organizing activities and their political activities is nowhere more unworkable than in the State of Illinois. The State is besieged by intractable budgetary problems, with the most recent budget proposal from the General Assembly inviting the State to spend at least $36 billion against projected revenues of $32 billion. The budgetary problem is exacerbated by long-term financial issues, stemming in large part from the State's unfunded pension liability that now exceeds $111 billion. A quarter of the budget is in fact devoted to paying down that unfathomable pension liability. The future does not look bright either: Things are projected to get only worse, and legislators must cut essential services to afford these excessive employee salaries and benefits, which are among the most expensive in the country.[4]

Public-sector unions' collective bargaining efforts compete against the very same scarce dollars that are subject to intense public debate in Illinois. That is where *Abood's* supposed distinction between collective bargaining and lobbying disappears.

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[4] Andrew J. Biggs & Jason Richwine, *Overpaid or Underpaid? A State-by-State Ranking of Public-Employee Compensation American Enterprise Institute for Public Policy Research*, AMERICAN ENTERPRISE INSTITUTE, April 2014, *available at* https://www.aei.org/publication/overpaid-or-underpaid-a-state-by-state-ranking-of-public-employee-compensation/.

AFSCME, the largest public-sector union in Illinois, currently demands that the State lock arms with AFSCME and lobby the legislature for pension protection and tax increases. In *Abood* terms, AFSCME is using "fair share" dollars for non-chargeable purposes under the guise of conducting a chargeable collective bargaining exercise. But of course, lobbying the executive branch to join AFSCME in lobbying the General Assembly is all lobbying. In sum, no meaningful distinction exists between collective bargaining and lobbying on issues of pronounced public importance.

As this Court has recognized in a line of cases culminating in a case arising out of Illinois, *Harris*, 134 S. Ct. at 2631–32 (2014), the purported distinction between political advocacy and collective bargaining is entirely artificial. Relying on unworkable and incorrect factual premises, *Abood*, which the Court questioned from the outset, is defensible no longer. This Court recently emphasized, in *Obergefell v. Hodges*, 576 U.S. ___ , 135 S. Ct. 2584, 2605–06 (2015), its ability to protect fundamental rights where the executive is unable and the legislature is unwilling to act. In Illinois, that is precisely this case. In *Kimble v. Marvel*, 576 U.S. ___ , 135 S. Ct. 2401, 2409 (2015), the Court re-emphasized its primacy in overturning the case law that it itself has made. That too is precisely this case. In *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 854–55 (1992), the Court set forth the factors justifying overturning its own precedent. Those factors apply here. The Court should now finish the logical extension of *Harris* and overrule *Abood*.

## ARGUMENT

### I. *Abood* Is Built On Unworkable And Incorrect Assumptions.

As Petitioners persuasively demonstrate, *Abood* more than adequately satisfies this Court's requirements for overturning precedent. *See* Pet. Br. 51–60. *Amici* wish to supplement Petitioners' arguments by illustrating, using actual examples from Illinois's history of public-sector collective bargaining, why *Abood*'s factual predicates are as unworkable as they are incorrect. Specifically, contrary to *Abood*'s premise that the two can be distinguished, collective bargaining in the public sector is lobbying by another name. No more persuasive is the free-rider concern used to justify *Abood*. As provisions in Illinois public-sector collective bargaining agreements reveal, unions frequently impose significant costs on certain employees, making it all the more likely that objecting employees would be better off without the unions' supposedly beneficial speech that these employees are forced to subsidize.

In sum, Illinois is a poster child for why *Abood* should be overruled and all public-sector employees' First Amendment rights restored.

#### A. Collective Bargaining In Illinois Is Indistinguishable from Lobbying on Matters of Public Importance.

The core of *Abood*'s approach was to attempt to draw a line between union expenditures for collective bargaining, contract administration, and grievance-adjustment purposes, on the one hand, 431 U.S. at 232, and expenditures for political or ideological

purposes on the other. *Id.* at 236. But even *Abood* presciently understated that "[t]here will, of course, be difficult problems in drawing lines between collective bargaining . . . and ideological activities." 431 U.S. at 236. The Illinois experience proves that drawing such lines is not merely difficult but impossible.

Consider, for example, the pension provision in the collective bargaining agreement ("CBA") between the Executive Branch and AFSCME, which represents the vast majority of state employees. The CBA that expired June 30, 2015 and is currently subject of contentious negotiations states that employees enjoy pension rights statutorily provided in the Illinois Pension Code. AFSCME Master Contract, Art XIII Sec. 3. But pensions in Illinois are severely underfunded, with the State carrying on its books over $100 billion in underfunded pension obligations. No doubt concerned that the legislature will continue looking for ways to curtail pension benefits as a way of dealing with the State's massive fiscal problem, AFSCME proposed as part of the current collective bargaining that the Executive Branch join AFSCME in lobbying the legislature for a mechanism by which the pension fund boards can compel payment of pension contributions by the State. Currently, no such mechanism exists. Although the Illinois Constitution guarantees pension benefits, it does not guarantee the funding of such benefits. *See In re Pension Reform Litigation*, 32 N.E.3d at 8. If the State is unable to make the required payment, then the pension funds will not receive that payment.

Needless to say, in the State of Illinois, this is an issue of extreme public importance. Under the

guise of collective bargaining, AFSCME, is demanding that the Executive Branch join AFSCME and advocate for a legislative change to ensure that pension contributions are made, presumably by putting pension boards first in line ahead of the State's health, educational, and other priorities. Regardless of the merits of this position, this is highly political speech on which the citizens of the State of Illinois, including government employees, may fairly disagree. Yet AFSCME's speech, and AFSCME's speech alone, is subsidized by non-members' "fair share" dollars.

In a similar vein is AFSCME's current proposal to address the State's fiscal environment. September 2015 marks the State's third month without a budget. The issue began when the General Assembly submitted to the Governor an unbalanced budget, in violation of the Illinois Constitution. The submitted budget, which the Governor vetoed, was at least $4 billion short, committing the State to spend upwards of $36 billion against projected revenue of $32 billion. Recognizing that its ability to negotiate economic benefits during collective bargaining depends on the State's ability to afford them, AFSCME proposed an addition to the CBA entitled "Meeting Illinois' Revenue Needs." The provision reads, in part: "The Union and the Employer agree that our state budget cannot be balanced with existing revenue. . . . Illinois, however, can meet its revenue challenge with measures that address the state's long-term structural deficit and ensure corporations pay their fair share." Again, Illinois citizens may reasonably disagree on matters such as corporate taxation, but that is an inherently political debate, not a subject for collective bargaining.

If that were not enough to show that collective bargaining is political and ideological, AFSCME's proposal continues: "Before any layoffs or service cuts are considered, the parties agree to work jointly to modernize Illinois' tax system and rein in financial fees based on" several principles geared at producing "a fair tax system in Illinois" and holding financial institutions "accountable for unethical and questionable practices." Whether right or wrong on the merits, the proposal is again inherently political and ideological, inextricably tied to one of the most pressing issues of public concern in Illinois. Here, too, AFSCME's highly political speech is subsidized by "fair share" dollars.

Nor is the current collective bargaining session an outlier in this regard. AFSCME and other unions often take the position that wages, benefits, and other terms of collective bargaining agreements can be maintained or increased simply by increasing taxes on Illinois citizens. Henry Bayer, AFSCME's immediate past Executive Director, took the position during the last round of negotiations, for example, ending in 2013, that it was unnecessary for the State to cut back benefits to public employees. Instead, Mr. Bayer argued, the State needed simply to increase taxes to pay wages and benefits to public employees. Similarly, Terry Reed at the Illinois Federation of Public Employees, Local 4408, IFT/AFT ("IFPE") took the position around 2011 that Illinois should raise taxes to pay for wages and benefits to public employees and other state services. At the same time Mr. Reed made that comment, AFSCME and IFPE were lobbying the legislature for a tax increase. These are highly debatable and

inherently political topics on which speech may not be compelled or silenced.

Another recent Illinois example that proves the unworkability of *Abood*'s fictional line between collective bargaining and political activity is AFSCME's recent advocacy to replace collective bargaining with arbitration. In May 2015, the Illinois General Assembly passed Senate Bill 1229, which would have allowed unions negotiating with the State of Illinois to demand arbitration instead of negotiating with the Governor. *Available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1229&GAID=13&DocTypeID=SB&SessionID=88&GA=99. On July 29, 2015, the Governor vetoed the bill, triggering several weeks of intense public debate. *See generally*, Appendix of Illinois News Coverage of Senate Bill 1229. Until the General Assembly failed on September 2, 2015, to override the Governor's veto, AFSCME's chief spokesperson at the collective bargaining table opened several bargaining sessions with vigorous advocacy in favor of Senate Bill 1229. After first urging in strong language that the Governor sign the bill, following the Governor's veto AFSCME's chief spokesperson argued in favor of an override. Using non-members' "fair share" dollars, in other words, AFSCME lobbied the Governor's representatives to support legislation that was the subject of intense public political debate.

Other examples abound. During negotiations for the 2000-2004 CBA, for example, AFSCME bargained for and obtained for its members "the Rule of 85" of pension benefits. Under the rule, an employee with any combination of age and years of service that adds up to 85 can retire without penalty. AFSCME then successfully lobbied the legislature to

enact that change into law. *See* 40 ILL. COMP. STAT. 5/14-107; 40 ILL. COMP. STAT. 5/14-110(a)(i), (ii).

Frequently, AFSCME relies on non-members' "fair share" dollars to bargain for an agreement to seek or to oppose legislation. On December 17, 2013, for yet another example, AFSCME's collective bargaining efforts led to a memorandum of understanding with the State concerning the allowable scope and character of the State's subcontracting with a vendor called Maximus. In the memorandum, the parties agreed to oppose legislative efforts that would have resulted in certain additional work being subcontracted to Maximus. This, too, independent of the merits, is purely political.

The above examples are far from unique. They merely illustrate the impossibility of separating public-sector collective bargaining from other political activity of public-sector unions. Simply put, public employee unions in the United States are *sui generis*. Unlike private sector unions, which pit labor against management in meaningful negotiation, public sector unions permit labor and management to sit on the same side of the table. There they "bargain" with the taxpayers' money. All too often, as the Illinois example demonstrates, the resulting "bargaining" takes place irresponsibly, because it is always with someone else's money.

As such, "decision-making by a public employer is above all a political process" undertaken by people "ultimately responsible to the electorate." *Abood*, 431 U.S. at 228; *see Harris*, 134 S. Ct. 2631–32 (2014); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015)

("[T]he Legislature' did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people."), *citing Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *cf. Smiley v. Holm*, 285 U.S. 355, 365 (1932) (holding that Minnesota's legislative authority includes not just the two houses of the legislature but also the Governor's veto power).

Not surprisingly, then, AFSCME's collective bargaining in Illinois has proven quite successful in obtaining concessions that Illinois taxpayers cannot sustain. Under single-party rule over the last decade, AFSCME has received 27 separate pay increases. In current negotiations, AFSCME is demanding salary increases of 11.5% - and up to 29% for certain positions when seniority is considered - over four years. The proposal, combined with AFSCME's other requests tied to wages and health insurance, is estimated to cost the State an additional $2.1-2.5 billion over the course of a four-year contract. That is on top of the current budget deficit of over $4 billion. Setting aside AFSCME's current proposal to increase taxes, the proposal is quite simply unsustainable.

In sum, public sector unions should no longer be allowed to lobby for preferred outcomes with the money they receive from nonmembers.

### B. The Free-Riding Rationale for *Abood* Ignores that Unions' Collective Bargaining Efforts Frequently Do Not Promote the Interests of All Public Employees Within a Bargainig Unit.

Unions' collective bargaining agreements are often not even in the best interest of all public employees within the relevant bargaining unit. That, of course, belies the free-rider rationale used to justify *Abood*. The Illinois public-sector collective bargaining experience once more illustrates this point.

Take, for example, AFSCME's 2012-2015 CBA. The agreement contains numerous provisions that tie employment decisions and conditions of employment to seniority, not merit. A less senior but better performing non-member would be far better off without the union's speech that the non-member is nonetheless forced to subsidize through "fair share" fees.

More specifically, Article VIII, Section 2(b) of the Illinois AFSCME agreement states that, "in cases of promotion, layoffs, transfers, shift and job assignments, seniority shall prevail unless a less senior employee has demonstrably superior skill and ability to perform the work required in the position classification." The training manual for the labor relations arm of the Illinois Department of Central Management Services—the agency that administers collective bargaining agreements with the State—in turn instructs that "demonstrably superior" means the less senior employee must be "head and shoulders above" the more senior employee. Proving that someone is "head and shoulders above" a

colleague is both difficult and unenviable, particularly in a union world in which a decision invariably leads to a multi-step grievance process. Not surprisingly, the State almost never appoints less senior employees to positions. A less senior but more capable employee is manifestly not "free riding" on AFSCME's collective bargaining efforts. To force that person to support collective bargaining through "fair share" fees is as offensive as it is wrong.

Additional examples of AFSCME's persistence in protecting its senior members at the expense of more junior but more capable employees include but are not limited to:

- "Where the Employer is unable to grant and schedule vacation preferences for all employees within a position classification within a facility but is able to grant some of such (one or more) employees such vacation preferences, employees within the position classification shall be granted such preferred vacation period on the basis of seniority." Art. X, Sec. 6.
- "Where some but not all employees are scheduled to work a holiday, the scheduling shall be offered on a seniority rotation basis." Art. XI, Sec. 11.
- Overtime "shall be distributed on a rotating basis among such employees in accordance with seniority." Art. XII, Secs. 3(e), 4(e), and 5(e).
- "When a job assignment vacancy is posted and more than one employee within the position classification requests such an assignment, consideration shall be given to

the employee with the most seniority in the same position classification posted." Art. XIX, Sec. 3(A).

- When permanent shift assignments are made, employees may exercise seniority to retain their shift assignments. Art. XIX, Secs. 4(A)(1) and B(2).
- A displaced employee may exercise seniority to bump a junior employee on a shift of his preference. Art. XIX, Secs. 4(B)(5) and 4(C).
- Selection for promotion or voluntary reduction shall be based on seniority. Art. XIX, Secs. 5(A)(4) and (B)(5).
- Layoffs shall be conducted in reverse order of seniority, starting with the most junior employee. Art. XX, Sec. 2.

These are merely a few examples of unions' CBAs favoring more senior employees without any regard for merit. A junior employee that consistently outperforms a more senior colleague can hardly be "free riding" on a union's collective bargaining efforts to which the junior employee objects. That employee would be better off without the union's representation. The law should respect the employee's choice to opt out of union membership and not force that employee to nonetheless subsidize union speech.

## II. *Abood* On Its Face Conflicts With Core First Amendment Principles.

The unsustainable symbiotic relationship between government employee unions and the legislature deprives the people in general, and non-union employees in particular, of their proper voice in representative government while violating fundamental First Amendment freedoms of speech and association.

Among the laws that properly restrict the activities of public sector unions is the highest law of the land, namely the U.S. Constitution. That, of course, includes the First Amendment. As this Court held in *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), government employers therefore "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech."

Because public sector collective bargaining by its nature influences governmental policy, this Court has been quite clear that such bargaining necessarily involves political speech in a way that private sector collective bargaining does not. *Harris* at 2631–32; *Abood*, 431 U.S. at 231; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968). As a result, public employment cannot and should not be conditioned on subsidizing political speech any more than public employment can be conditioned on paying for lobbying for – or against – any particular legislation.

Such core political speech, moreover, is at the top of the "rough hierarchy in the constitutional protection of speech" that this Court has come to recognize. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring); *see also Snyder*

*v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (acknowledging the "hierarchy of First Amendment values"); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 206 (1982) ("The approach reflected in the Court's free speech opinions, and in almost every scholarly discussion of the first amendment, posits some hierarchy of values entitled to constitutional protection. Such a hierarchy implies a . . . ranking of particular categories of expression, according to the degree the expression implicates the underlying values.").

The distinction that *Abood* vainly attempts to impose between collective bargaining, contract administration, and grievance-adjustment purposes on the one hand, 431 U.S. at 232, and expenditures for political or ideological purposes on the other, 431 U.S. at 236, is entirely artificial and unworkable in practice. It also not only imposes unconstitutional conditions on employees' speech but also compels subsidized unintended speech and imposes viewpoint discrimination. This triple threat to the First Amendment mandates overturning *Abood* under the factors set forth in *Casey*, 505 U.S. at 854–55 (1992).

### A. *Abood* Imposes Unconstitutional Conditions on Political Speech.

A long line of this Court's decisions rejects "the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996); *see also, Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 673 (1996) (collecting cases). So, for example, public

employers can neither require membership in any particular political party, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), nor bar members of even, say, the Communist Party from public employment. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609–10 (1967).

Yet by allowing the government to condition employment on support for a union's political activities, *Abood* conflicts irreconcilably with both *Elrod* and *Keyishian*. *See Abood*, 431 U.S. at 243–44 (Rehnquist, J., concurring) ("I am unable to see a constitutional distinction between a government-imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."); *id.* at 260 n. 14 (Powell, J.,) ("I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of greater deference, when challenged on First Amendment grounds, than its decision to adhere to the tradition of public patronage.").

As this Court has also long recognized, the First Amendment's "freedom of speech" necessarily comprises the decision of "both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988); *see also, Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). In *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968), therefore, the Court held that the First Amendment prohibits firing a public school teacher for criticizing a school district's efforts to raise revenues. Under *Abood* this Court therefore could not constitutionally compel teachers to speak on

those same topics. Yet that is exactly what the currently-permitted public employer "agency shop" not only condones but compels, especially as agency fees approach the amount of union dues.

### B. *Abood* Unconstitutionally Compels Unintended Speech.

Drawing on *United States v. United Foods*, 533 U.S. 405 (2001), this Court made clear three years ago in *Knox v. Serv. Emps. Int'l Union*, 567 U.S. __, 132 S. Ct. 2277, 2289 (2012), that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny. First, there must be "a comprehensive regulatory scheme involving a 'mandated association' among those ... required to pay the subsidy." *Id.* (quoting *United Foods*, 533 U.S. at 414). Second, compulsory fees may be levied "only insofar as they are a 'necessary incident' of the larger regulatory purpose which justified the required association." *Id.* (*quoting United Foods*, 533 U.S. at 414).

In *United Foods*, this Court therefore invalidated mandatory assessments imposed by a Department of Agriculture "Mushroom Council." (The Council had been established under Congressional authority to promote the mushroom industry.) The Council funded its programs by imposing on fresh mushroom handlers mandatory assessments, almost all of which were used for generic advertising to promote mushroom sales. 533 U.S. at 412. Respondent objected to the mandatory fee because it wished to promote its own brand of mushrooms as superior to those of other producers. *Id.* at 411. This Court held that the two conditions above could not be met and invalidated the fee.

*Abood* stands *United Foods* on its head. First, compelling payments to public-employee unions is not a "necessary incident" to a mandated association for non-speech reasons. The very purpose of the agency fees is to fund the union's advocacy. Thus, those payments are compelled for the express purpose of supporting union speech in collective bargaining. *Abood* therefore conflicts with the Court's historical refusal to uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415.

Second, *Abood* inverts the level of constitutional protections otherwise provided for commercial speech on the one hand and purely political speech on the other. This Court has consistently held that commercial speech is entitled to less protection than core political speech, which is at the heart of the First Amendment. *E.g., R.A.V.* , 505 U.S. at 422 (1992) (Stevens, J., concurring) ("Core political speech occupies the highest, most protected position" in the First Amendment hierarchy). *United Foods* obviously involved purely "commercial speech" – the promotion of mushroom sales. On First Amendment grounds, *United Foods* correctly invalidated compelled commercial speech requirements, yet *Abood* continues to sanction compelled political speech. *Abood*'s holding is therefore both anomalous and contrary to *Knox*.

Third, unlike unwilling public employee union members, dissenting mushroom producers in *United Foods* remained free to run competing ads touting their own brands of mushrooms. By its very nature, union labor law provides for an exclusive bargaining unit. If *Abood* is left standing, *amici* have no other

outlet than the union they do not wish to join to vindicate their views.

*Amici* here, therefore, cannot meaningfully engage in speech that counters the union message in dealing with their employer, the people of the State of Illinois. This coerced combination of forced silence and forced subsidization of unwanted speech renders *Abood* unconstitutional under the First Amendment.

### C. *Abood* Unconstitutionally Imposes Viewpoint Discrimination.

Finally, *Abood* on its face imposes the most "egregious" form of First Amendment regulation – clear-cut viewpoint discrimination. *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

Curiously, *Abood* recognized that public employees "may very well have ideological objections to a wide variety of activities undertaken by the union," and may "believe[] that a union representing [them] is urging a course that is unwise as a matter of public policy." 431 U.S. at 230. Yet *Abood*, as it stands, nevertheless permits states like Illinois to promote unions' messages by compelling employees to support those unions and their message.

Under this Court's own precedents, such state-mandated support for union speech is indisputably viewpoint discrimination. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976); *see also Rosenberger*, 515 U.S. at 831–32 (viewpoint discrimination occurs when a speech regulation "skew[s] . . . [a public] debate" in favor of one party or

another). By sanctioning agency-shop laws, however, that is precisely what *Abood* not only permits, but also compels. The Court should overturn it.

## CONCLUSION

The Court should overturn *Abood*.

Respectfully submitted,

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# APPENDIX
## Illinois News Coverage of Senate Bill 1229

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